BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARCIA POWELL	)	
Claimant	)	
	)	
VS.	)	Docket No. 1,028,316
	)	
DILLON COMPANIES, INC.	)	
Self-Insured Respondent	)	

ORDER

Respondent requests review of the July 6, 2006 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

The Administrative Law Judge (ALJ) found that the claimant was injured out of and in the course of her employment with the respondent on March 15, 2006, and ordered the respondent to furnish the names of 3 physicians for the claimant to choose a treating physician. He also ordered all medical, including the unauthorized to be paid up to the statutory limit and ordered temporary total disability benefits to be paid beginning March 21, 2006 at a rate of $206.26 per week until released.

The respondent requests review of this decision alleging the claimant failed to sufficiently establish she met with personal injury by accident out of and in the course of her employment.

Claimant argues that the ALJ's order should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

On March 15, 2006, claimant reported to work in respondent's floral department and began cleaning up. As she was lifting a bucket, she noticed it to be too heavy. She sat the bucket down and dragged it into the cooler rather than lifting it. Claimant returned to

work but noticed her back was hurting. She sat down on a stool and after a moment, she returned to work, finishing her shift and even working the next few days. Claimant last worked for respondent on March 21, 2006, albeit with a cane to help her ambulate. On that date, she worked only a few hours and was then sent home. She was told that she could not return to work until she was able to do so without a cane. Claimant continued to have leg and back pain which she associated with the March 15, 2006 event. She noticed the problems mostly when walking up stairs.

Claimant has experienced back complaints in the past but according to her, this pain was "stronger" this time.[1] Shortly after the March 15, 2006 accident claimant sought treatment from a chiropractor and concluded that if her back could just be "straightened, I'd be okay, you know, and could go ahead and work."[2] The chiropractor's records do not reflect any work-related injury. According to claimant, she and the chiropractor agreed that he would not mention the source of her injury in his records because she had no intention of making a claim.[3]

Unfortunately, claimant's complaints continued and she went to Dr. Bryan Davis, the respondent's designated workers compensation physician. Claimant is involved in another workers compensation case with respondent and she knew him to be the designated physician.

Dr. Davis saw claimant on March 24, 2006 and initially diagnosed bursitis based upon her complaints of hip pain. His office note does not reflect any work-related injury. Claimant returned to him on March 28 because her complaints were unresolved. During this visit, he suggested an MRI for the lumbar spine. The MRI revealed facet degenerative changes. Dr. Davis indicated claimant would recover and suggested some activity restrictions including bed rest. After a second visit and because her symptoms were continuing, he recommended she be seen by an orthopaedist for a second opinion.

On March 29, 2006 claimant provided respondent with a letter indicating she had sustained an injury lifting a bucket of flowers and water on March 15, 2006. Her letter further indicates she is asserting a workers compensation claim and is in need of medical treatment.[4]

Dr. Paul Stein saw the claimant, at the request of her counsel, for an IME on May 11, 2006. As of the time of this examination she had complaints of difficulty in her

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[1] P.H. Trans. At 10.

[2] *Id.* at 10-11.

[3] *Id.* at 19.

[4] Timely and sufficient notice is not disputed. *Id.* at 5.

arms and back. Both upper extremities hurt equally, with pain in the wrists and elbows which extended down the forearms, she had pain in both shoulders and numbness and tingling in the first, second and sometimes third fingers of the right hand.[5] She also had low back pain that extended into the left lower extremity along the outside of the thigh to a little below the knee. She also has intermittent numbness and a cold feeling in her left foot.

Claimant informed Dr. Stein that she had a prior back injury and has had intermittent difficulty since and that chiropractic treatment has been helpful. In his report Dr. Stein stated that the claimant told him that there has been no specific injury or accident related to her work activity although she relates her upper extremity and back complaints to work.[6] And there is a reference to a lifting incident at work in March, 2006.[7]

Dr. Stein ultimately recommended epidural steroid injections and physical therapy with traction as an appropriate treatment to address claimant's low back complaints. And that if that does not work she should consider surgical intervention. He recommended that the claimant avoid repetitive bending and twisting of the lower back and lifting more than 20 pounds very occasionally with no repetitive lifting. She should also avoid bending and twisting of the lower back and avoid repetitive lifting from below knuckle height, and finally that there should be an opportunity to alternate sitting, standing and walking as necessary.[8]

The ALJ concluded claimant had met her burden to establish that she injured her low back on March 15, 2006 in an accidental injury arising out of and in the course of her employment. The Board has considered the record as a whole and based upon the evidence finds the ALJ's preliminary hearing Order should be affirmed. By the barest of margins, the Board is persuaded that claimant's recitation of the events of March 15, 2006 led to an accidental injury to her low back. Claimant may well have a pre-existing condition and her present complaints could present nothing more than a temporary aggravation. It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.[9] The test is not whether the job-related activity or injury caused the condition, but whether the job-related activity or injury aggravated or accelerated the condition. However,

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[5] It appears that the upper extremity complaints are relevant to claimant's other workers compensation claim and not this matter as her injury in this claim is to her low back.

[6] P.H. Trans., Ex. 1 at 1 (Stein's IME Report).

[7] *Id.*, Ex. 1 at 6 (Stein's IME Report).

[8] *Id.*

[9] *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984)*; Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

at this juncture of the proceedings, it is unnecessary to make that determination. Whether a new injury or an aggravation of an old one, both are compensable.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge John D. Clark dated July 6, 2006, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August, 2006.

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BOARD MEMBER

c: Michael L. Snider, Attorney for Claimant
Edward D. Heath, Jr., Attorney for Respondent and its Insurance Carrier